Petition

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OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

81-783

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARTHA J. TECLAW
Petitioner,

v.

JAMES G. WATT
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of Title VII of the Civil Rights Act of 1964, as amended by the Age Discrimination in Employment Act of 1967, for an employer, on the basis of self-serving statements which are contrary to the documentary evidence of record, to deny a promotion to a qualified sixty year old employee with a history of successful equal employment opportunity complaints, in favor of a twenty eight year old employee who does not meet the minimum qualifications for the position, but also has no history of activities in opposition to discriminatory employment practices.

2. Whether the protections against age discrimination in employment contained in the Age Discrimination in Employment Act, as amended, are necessarily narrower in scope than the protections against

employment discrimination based on race, sex and the other criteria contained in Title VII of the Civil Rights Act of 1964, as amended.

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NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

MARTHA J. TECLAW
Petitioner,

v.

JAMES G. WATT
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Martha J. Teclaw, by and through her counsel, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia filed on July 30, 1981.

OPINIONS BELOW

The decision and judgment of the United States District Court for the District of Columbia, dated June 12, 1980, dismissing petitioner's complaint is printed at pages A-1 to A-13, infra, and is not officially reported.

The order of the United States Court of Appeals for the District of Columbia, dated June 19, 1981 affirming the District Court without opinion is printed on page B-1, infra, and is not officially reported.

The order of the United States Court of Appeals for the District of Columbia, dated July 30, 1981, denying petitoner's petition for rehearing and suggestion for rehearing in banc is printed at page C-1, infra, and is not officially reported.

JURISDICTION

Petitioner's timely petition for rehearing was denied by the United States

Court of Appeals for the District of Columbia on July 30, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are 29 U.S.C. §622, et seq. (Age Discrimination in Employment Act of 1967, as amended) and 42 U.S.C. §2000e, et seq. (Title VII of the Civil Rights Act of 1964) which specifically provides in part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees because....he has opposed any employment practice made an unlawful practice by this subchapter...."

STATEMENT OF THE CASE

This is a case of illegal retaliation and age discrimination in employment. It involves the interpretation and application of certain statutes passed by the Congress to insure equal opportunity in employment

without regard to such arbitrary classifications as age and to provide employees with an effective mechanism for redressing discriminatory treatment by their employers without fear of reprisal.

Petitioner Martha J. Teclaw is a sixty one year old woman who is employed as a paralegal specialist at the GS-11 level by the Eastern States Office of the United States Department of Interior. She began her career with the Interior Department in 1961 in Alaska at the GS-6 level. In 1974 she was invited to join the staff of its Eastern States Office in the Washington, D.C. area for the purpose of assuming responsibility for the docket section. She discharged that responsibility with distinction.

In the intevening years, as Martha Teclaw grew older, it became necessary for her to overcome age related barriers in her employment by successfully pursuing equal

employment opportunity complaints against her employer to attain promotion to the GS-9 level and to the GS-11 level. At the same time, much younger employees were being promoted to similar levels of salary and responsibility with relative ease. In the course of these activities she necessarily became identified in the eyes of her employer with employee opposition to discriminatory employment practices. Her work environment grew increasingly hostile.

In 1978 Martha Teclaw responded to a vacancy announcement for the position of branch chief at the GS-12 level. The vacancy announcement was cancelled. It was subsequently reannounced as a GS-11/12 position. A women in her late twenties who did not meet the minimum qualifications set forth in the vacancy announcement, in terms of education and experience, was chosen by the same selecting official who had been involved in Martha Teclaw's prior

successful discrimination complaint. The selection was announced the day after Martha Teclaw's prior complaint had been resolved in her favor.

After exhausting her administrative remedies, petitioner commenced Civil Action No. 79-1429 in the United States District Court for the District of Columbia. A trial de novo was held on May 28 through 30, 1980. On June 12, 1980 the District Court entered judgment for the defendant. On June 19, 1981 the United States Court of Appeals for the District of Columbia affirmed the District Court without opinion. A timely petition for rehearing and suggestion for rehearing in banc was filed on July 2, 1981. The petition for rehearing and suggestion for rehearing were denied on July 30, 1981.

Petitioner now files this Petition for Writ of Certiorai.

ARGUMENT

This Petition for Writ of Certiorai should be granted for the following reasons:

1. The parameters of the decision this Court reached in Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981) are in need of further definition.

The decision of the district court in this case has produced a result in conflict with McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973) and with the more recent decision of this Court in Burdine. The district court - on the basis of inapplicable and misinterpreted precedents - and without reference to McDonnell Douglas - incorrectly concluded that no prima facie case of illegal retaliation or age discrimination had been established. In fact, petitioner established a prima facie

case under the standards of McDonnell Douglas and proved both of her claims by a preponderance of the evidence of record.

In Burdine this Court held that after a plaintiff has proved a prima facie case of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the defendant employer has articulated a nondiscriminatory reason for its actions, the plaintiff may show that such reason is a pretext. The basic burden of proof by a preponderance of the evidence always rests on the plaintiff.

In this case Defendant was able to articulate no nondiscriminatory reasons for its action beyond certain self-serving statements which were clearly contrary to the evidence of record. Petitioner was found qualified for the vacancy. The selectee failed to meet the minimum standards set forth in the vacancy

announcement in terms of education and experience. Defendant sought to justify its non-selection of petitioner by testimony from interested witnesses to the effect that the selectee was "top notch, etc."

A writ of certiorai should be granted in this case for the purpose of defining whether any explanation proferred by an employer to explain its action is sufficient to rebut plaintiff's prima facie case if the defendant's explanation is contrary to the documentary evidence of record. The Burdine decision needs to be clarified lest it produce results, such as the one in this case, which amount to a repeal of the proscriptions on illegal employment practices imposed on employers by Title VII.

2. A writ of certiorai should issue in this case to conclusively establish that discrimination in employment on the basis

of age is to be judged and proven by the same standards applicable to the other arbitrary criteria proscribed by Title VII.

The District Court expressly held in this case that discrimination on the basis of age is different from discrimination on the basis of other illegal criteria such as race or sex. The language and legislative history of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §622 et seq. show conclusively that Congress intended otherwise.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), this Court promulgated certain guidelines for determining those instances in which age related restrictions in employment may be appropriately imposed. Although petitioner (a member of a class of employees specifically exempted from mandatory retirement by

the Congress) came within none of these guidelines, the district court read the Massachusetts Board of Retirement case as permitting discrimination on the basis of age to be judged by less stringent standards than other forms of illegal discrimination.

The genesis of the Age Discrimination in Employment Act of 1967 was Section 718 of Title VII of the Civil Rights Act of 1964, Public Law 88-352, which directed the Secretary of Labor to make a study of the factors tending to result in discrimination in employment on account of age. Based upon a 1965 Labor Department study which found widespread discrimination against older workers, the Secretary, in February 1967, proposed the Age Discrimination in Employment Act to the Congress. No where in the legislative history of that proposal, prior to its passage into law later that same year, is there any

suggestion that discrimination in employment on the basis of age may be judged by a more lax standard than discrimination on the basis of the other arbitrary classifications prohibited by Title VII of the Civil Rights Act of 1964.

While other lower courts have properly held that the two statutes should be interpreted consistently with each other, there obviously exists some confusion in this area which should be dispelled. A writ of certiorai should be granted in this case to resolve such doubt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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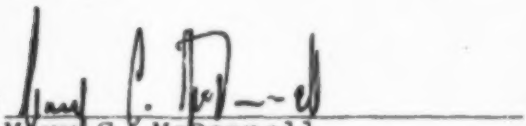
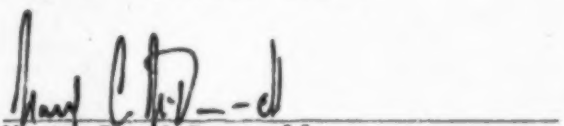
by: 
Mary C. McDonnell
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Mary C. McDonnell, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorai to the United States Court of Appeals for the District of Columbia have been served upon attorney for respondent by mailing same postage prepaid to June R. Carbone, Esquire, Department of Justice, 10th and Pennsylvania Avenue, N. W., Washington, D. C. 20530 this twenty third day of October 1981.


Mary C. McDonnell
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA J. TECLAW :

Plaintiff :

v. : Civil Action No. 79-1429

CECIL D. ANDRUS :

Defendant :

MEMORANDUM OPINION

Plaintiff, Martha J. Teclaw, a 60 year old female employed at the Eastern States Office (ESO), Bureau of Land Management, Department of Interior, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. She alleges that she was not selected for a GS 11/12 Branch Chief position in the Eastern States Office because of discrimination on the basis of her age and sex[1/]

1/ Plaintiff abandoned her claim of sex discrimination at trial since the selectee for the position of Branch Chief and her predecessor in the position were female.

and because of retaliation for her earlier Equal Employment Opportunity complaints.

Findings of Fact

This action arose out of a Vacancy Announcement WO78-138 issued in April 1978 inviting candidates to apply for the GS-12 position of Branch Chief of the Minerals Branch of the Eastern States Office. Because none of the three applicants who responded met the minimum Civil Service requirements, the announcement was cancelled. The position was readvertised in Vacancy Announcement WO78-179 in August 1978 as a GS-11/12. As a result, three of five applicants were rated qualified by the Personnel Office and referred to the selecting official: plaintiff, Martha J. Teclaw; Lonna McKenna, the selectee; and James Pannabecker. Because Mr. Pannabecker was employed as a research assistant at the Center for Urban and Regional Studies in

Chapel Hill, North Carolina, and had no experience as a land law adjudicator, he was eliminated from consideration.

At the time the Vacancy Announcement was issued, both Ms. Teclaw and Ms. McKenna were GS-9 land law examiners in the Eastern States Office. Ms. Teclaw began her employment at the ESO in March 1974. She transferred there from the Alaska State Office of the Bureau of Land Management in order to organize the ESO docket section. In October 1974, plaintiff was selected as an upward mobility trainee and began to work in mineral adjudications. In 1975 she filed her first EEO complaint, contending she was being paid a GS-7 salary while performing GS-9 work. After a desk audit was conducted confirming plaintiff's contention, she was promoted to a GS-9 in late 1975.

Between 1976 and 1978, Ms. Teclaw continued to gain experience as a minerals

adjudicator. In fact, she became one of the few GS-9 or senior land law examiners in the office. In 1976 she filed her second EEO complaint, alleging that defendant's failure to promote her was part of a continuing pattern of discrimination against women in the ESO. As a result of this complaint, plaintiff, in September 1978, received a promotion to a GS-11 retroactive to November 1976.2/

In August 1976, Lonna McKenna, who at that time was in her mid to late twenties, started to work in the ESO. She had been employed previously by the Bureau of Land Management in the Utah State Office, where she had worked in minerals adjudication since 1973. By the time she arrived in the ESO, Ms. McKenna was fully trained in the substantive aspects of land law

2/ It should be noted that plaintiff had not received her promotion to a GS-11 at the time the Vacancy announcement for the position of Branch Chief was issues.

adjudication. She needed to be familiarized only with the manual records system maintained by the ESO, because the Utah State Office had converted to a computerized records system. Ms. McKenna was given increasing responsibility, including the training of junior adjudicators and participating in various task forces. Although she started as a GS-7, she was promoted to a GS-9 in August 1977 when she became Assistant Branch Chief. This position provided her with the opportunity to become Acting Branch Chief on the numerous occasions when Marcia Rohn, who was Branch Chief at the time, was absent from the office.

When Ms. Rohn vacated her position in April 1978, Ms. McKenna became Acting Branch Chief.

Lowell Udy, Director of the ESO[3/]

3/ Mr. Udy retired from the Eastern States Office in January 1980.

was the selecting official in this case. He evaluated plaintiff's and Ms. McKenna's applications including their Standard Form 171's, letters of recommendation and commendation and their most recent performance evaluations. He also relied on his own appraisal of their performance. Based thereon, he found that plaintiff and Ms. McKenna had an approximately equal amount of experience as land law examiners. He found that Ms. McKenna had superior and more job related educational credentials. In addition, he noted that Ms. Teclaw's most recent performance evaluation indicated she needed to write more concisely and move her cases more quickly whereas Ms. McKenna's was satisfactory in all respects. Mc. Teclaw's recommendations were not as strong or as detailed as Ms. McKenna's. Finally, Mr. Udy considered the need to fill the position with some

one who could get along with as well as supervise and train junior adjudicators. Based on his personal observation of their performances, he found Ms. McKenna's qualifications superior.

On September 29, 1978, plaintiff was informed that she was not selected for the position, and after she exhausted the available administrative remedies, this action ensured.

Conclusions of Law

The jurisdiction of the Court is conferred under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-16 and the Age Discrimination in Employment Act of 1967, 20 U.S.C. § 62 et seq. Plaintiff has properly exhausted her administrative remedies pursuant to both Acts.

Plaintiff has the burden of proving each false claim of discrimination by a preponderance of the evidence. Hackley v.

Roudebusch, 520 F.2d 108, 117-118 (D. C. Cir. 1975); Mastie v. Great Lakes Steel Corporation, 422 F.Supp. 1299 (E.D. Mich. 1976)

To establish discrimination or retaliation, plaintiff must first establish a prima facie case; that is, actions by the employer "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on discriminatory criterion illegal under the Act.'" Furno Construction Company v. Waters, 438 U. S. 567, 575 (1978).

In applying the Age Discrimination in Employment Act of 1967, 20 U.S.C. § 62, et seq., the courts have recognized that age discrimination is different from discrimination on the basis of race or sex. The Supreme Court, in refusing to apply a "strict scrutiny" test to classifications by age challenged on constitutional grounds,

explained that:

> While the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment: or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976). For similar reasons, the court in Mastie v. Great Lakes Steel Corp., supra, emphasized that:

> . . . The Act (ADEA) was designed only to attack personnel policies and practices which arbitrarily classified employees or potential employees on the basis of age and did not seek to affect employers decisions based on individual assessments of a person's abilities, capabilities and potential.

Id. at 1307.

Plaintiff in this action has been unable to point to personnel policies or practices barring older people from consideration for supervisory positions. The selecting official, as well as numerous other supervisory officials in the ESO were and are

over the age of 40. Nor can plaintiff establish a prima facie case solely by alleging that she is a member of a protected class, and that the selectee is under 40. Plaintiff applied for the position and was considered together with the other candidates. The mere fact of non-selection under such circumstances does not establish a prima facie case of discrimination or retaliation. See White v. City of San Diego, 605 f.2d 455, 458-459 (9th Cir. 1979); Olson v. Philco Food, 531 F.2d 474 (10th Cir. 1976); Nagawa v. Reed, 20 F.E.P. 481 (D.D.C. 1977).

Plaintiff cannot point to anything else to establish a prima facie case of age discrimination. She did not establish that she was better qualified than the plaintiff, and she produced no evidence of discriminatory intent.

Plaintiff also failed to establish a prima facie case of retaliation. The courts,

in defining a prima facie case of retaliation require a plaintiff to demonstrate that:

> . . . (1) she engaged in protected activity; (2) she was subsequently retaliated against; and (3) a causal relationship exists between the protected activity and the claimed harassment. Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

In this case, plaintiff did not establish any causal relationship between her Equal Employment Opportunity activities and the failure to select her for the Branch Chief position. She did not show that Mr. Udy considered anything other than the 171's, letters of recommendation, performance evaluations and his own assessment of the supervisory skills of the candidates. Nor has plaintiff given this Court reason to draw an inference of discrimination by establishing that she was the better qualified candidate. Thus, the Court concludes that plaintiff has not established a prima facie

case of discrimination based on age or retaliation.

Accordingly, judgment by separate order of this date is to be entered for the defendant and the action is to be dismissed with prejudice.

JUNE L. GREEN
U. S. District Judge

Dated: June 12, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA J. TECLAW :

Plaintiff :

v. : Civil Action No. 79-1429

CECIL D. ANDRUS :

Defendant :

ORDER

This case came before the Court for trial on May 28, 1980. Upon consideration of the testimony adduced at trial, the documents admitted into evidence, the submissions of the parties and the entire record herein, it is by the Court this 15th day of June 1980,

ORDERED that judgment be entered for defendant; and it is further

ORDERED that the instant action is dismissed.

JUNE L. GREEN
U. S. District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 80-1953 September Term, 1980

MARTHA J. TECLAW,

Appellant

v.

DREW L. LEWIS, JR., Secretary,
Department of Transportation

Civil Action
No. 79-1429

United States
Court of Appeals
for the District
of Columbia Cir-
cuit
Filed June 19,
1981
George A. Fisher
Clerk

Appeal from the United States District
for the District of Columbia

Before ROBINSON, Chief Judge, and TAMM and Mikva,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was agrued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the judement of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 80-1953 September Term, 1980

MARTHA J. TECLAW,
Appellant

Civil Action
No. 79-01429

v.

JAMES G. WATT, Secretary of
the U.S. Department of the
Interior

ARGUED 5-20-81

BEFORE: Robinson, Chief Judge; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

O R D E R

Appellant's suggestion for rehearing en banc has been circulated to the full Court and no judge of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

United States Court of Appeals
for the District of Columbia
Circuit
Filed July 30, 1981

George A. Fisher
Clerk

George A. Fisher
Clerk

BY:
Daniel M. Cathey
First Deputy Clerk

Opposition

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ALEXANDER L. STEVAS
CLERK

No. 81-783

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARTHA J. TECLAW, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Civil Rights Act of 1964, Title VII, 42 U.S.C.. 2000e *et seq.* 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-783

MARTHA J. TECLAW, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner, an employee of the United States Department of the Interior, filed this action in the United States District Court for the District of Columbia, claiming that respondent violated the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by selecting Lonna McKenna, a woman under 40, rather than petitioner, to fill a position as a Branch Chief. After trial on the merits, the district court found that petitioner had failed to establish either age discrimination or that her non-selection was a form of retaliation for her prior administrative equal employment opportunity complaints (Pet. App. A-1 to A-13).

The district court determined that petitioner had not established a prima facie case of age discrimination. To establish the relevant standard the district court invoked

Furnco Construction Corp. v. *Waters*, 438 U.S. 567, 576 (1978) (quoting *Teamsters* v. *United States*, 431 U.S. 324, 358 (1977)), holding that petitioner was obliged to establish actions by the employer "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act' " (Pet. App. A-8). The court found that petitioner could point to no personnel policies or practices barring employees over 40 from supervisory positions (Pet. App. A-9 to A-10); that she produced no evidence of discriminatory intent (*ibid.*); and that she had not established that she was better qualified than Ms. McKenna (*ibid.*). Finally the court found that the selecting official had found Ms. McKenna's qualifications to be superior on the basis of the candidates' applications, their letters of recommendation, performance evaluations, and his own assessment of their skills (Pet. App. A-5 to A-7, A-11). In the face of these facts, the court observed that petitioner could not "establish a *prima facie* case solely by alleging that she is a member of a protected class, and that the selectee is under 40" (Pet. App. A-10). The district court likewise found that petitioner had failed to establish a prima facie case of retaliation (Pet. App. A-11 to A-12). The court noted that petitioner had not shown that the selecting official considered anything other than legitimate job related criteria and indicia of ability in making the selection (*id.* at A-6, A-11). The court further observed that petitioner had not given the court "reason to draw an inference of discrimination by establishing that she was the better qualified candidate" (*id.* at A-11).

The court of appeals affirmed without opinion (Pet. App. B-1 to B-2) and denied petitioner's petition for rehearing en banc (Pet. App. C-1).

2. Further review is unwarranted because petitioner's argument rests on her disagreement with the factual findings of the district court affirmed by the court of appeals

and because the legal standard applied by the district court to determine whether petitioner established a prima facie case of age discrimination is consistent with the standard articulated by this Court. Moreover, because the court of appeals issued no opinion, its decision has no precedential effect and accordingly lacks general importance.

a. Petitioner's principal quarrel is with the district court's findings of fact. Indeed, she frames the first question tendered for review as whether it is a violation of the statute "for an employer, on the basis of self-serving statements which are contrary to the documentary evidence of record, to deny a promotion to a qualified sixty year old * * *" (Pet. i). Petitioner explains that "[a] writ of certiorari should be granted in this case for the purpose of defining whether *any* explanation proferred by an employer to explain its action is sufficient to rebut plaintiff's prima facie case if the defendant's explanation is contrary to the documentary evidence of record" (Pet. 9; emphasis in original).

The district court, however, found that the selcting official, respondent's subordinate, chose the selectee for the position sought by petitioner because he found Ms. McKenna to be better qualified after considering both candidates' official written performance evaluations, letters of recommendation, and educational credentials and his own knowledge of the two candidates' performance. The court noted that petitioner's most recent performance evaluation reflected deficiencies requiring correction (Pet. App. A-6 to A-7, A-10). The court of appeals affirmed those findings. Petitioner's contention that respondent failed to articulate a legitimate, non-discriminatory reason for the selection presents a factual question which merits no further review. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

b. Given the district court's dispositive findings of fact there is no reason for the court to reach petitioner's claim (Pet. 9-12) that the district court applied the wrong standard of law in ruling that petitioner failed to establish a prima facie case of age discrimination.[1] In any event, the district court's conclusion was consistent with the standards articulated by this Court.

Petitioner complains of the district court's general observation (Pet. App. A-8) that "the courts have recognized that age discrimination is different from discrimination on the basis of race or sex," and the court's reference to *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), and *Mastie* v. *Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976).[2] Petitioner ignores the fact that the standard actually employed by the district court to determine whether a prima facie case of age discrimination or retaliation had been established was derived from *Furnco Construction Corp.* v. *Waters, supra*, and thus rests ultimately upon *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Accordingly, the district court applied the same

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[1]Petitioner does not explain how a different legal standard would enable her to prevail in the face of the district court's findings. For this reason, there is no need to defer action on this case pending disposition of our petition for certiorari in *United States Postal Service* v. *Aikens*, No. 81-1044 (filed Dec. 4, 1981).

[2]*Massachusetts Board of Retirement* v. *Murgia, supra*, 427 U.S. at 312-314, was cited only for the proposition that age is not a suspect classification triggering strict scrutiny in an action founded solely upon the equal protection clause. No claim founded upon the ADEA was presented in *Murgia*. See 427 U.S. at 310 n.2. The district court clearly recognized that this Court's discussion of age discrimination was limited to constitutional claims (Pet. App. A-8) and did not apply the standard employed in *Murgia* in this case. *Mastie* v. *Great Lakes Steel Corp., supra*, 424 F. Supp. at 1307, was cited only for the unremarkable proposition that the ADEA " 'did not seek to affect employer decisions based on individual assessments of a person's abilities, capabilities and potential' " (Pet. App. A-9).

standard to petitioner's claim as is applicable to claims of racial discrimination. Petitioner's contrary contention (Pet. 10) rests upon a misreading of the district court's opinion.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

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[3]The district court's conclusion that petitioner could not "establish a *prima facie* case solely by alleging that she is a member of a protected class, and that the selectee is under forty" (Pet. App. A-10) is entirely consistent with this Court's holding that a Title VII plaintiff must prove that he or she "was rejected under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). We note that unlike the situation considered in *McDonnell Douglas Corp.* v. *Green, supra*, the employer here filled the position sought by petitioner with an individual determined to possess qualifications superior to petitioner's. Compare 411 U.S. at 807.

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